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ANALYSIS FOR STATE OF WASHINGTON

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Statute:

WASH. REV. CODE §§ 47.46.010 to 47.46.900

Summary:

New PPP enabling legislation was passed in May of 2005 (as H.B. 1541), but it is unlikely to encourage much private sector investment because (1) the only significant projects that require PPPs are state (WashDOT) projects; (2) the exclusive source of financing for WashDOT projects is state treasurer-issued indebtedness; and (3) no such indebtedness, or expenditures from it, may occur without prior legislative approval. Presently, solicited proposals only, but unsolicited proposals may be accepted after 1/1/07.

Key Elements of Washington's PPP Enabling Legislation

Last Updated: September 2005

No.	Issue:	Short Answer:	Sample Provision:
1.	Does the relevant law allow solicited and unsolicited proposals for PPP projects?	Yes, starting 1/1/07.	Solicited proposals only, as detailed in §9(a). Unsolicited proposals may be accepted after 1/1/07, as detailed in §§9(b) and 17.
2.	Does the relevant law permit local/state/federal funds to be combined with private sector funds on a PPP project?	No for WSDOT projects; yes for local projects.	§6(3) requires that any indebtedness regarding State-owned, leased, used or operated projects must be issued by the state treasurer. Private funds may therefore only be used to finance a private non-transportation project co-developed with a state transportation project.
3.	Who has rate-setting authority to impose user fees and under what circumstances may they be changed or otherwise reviewed?	WSDOT for WSDOT project; private entity by contract.	Because the state treasurer is the sole entity authorized to issue indebtedness on WSDOT projects, only WSDOT may set tolls for these projects. As for other projects, §6(e) authorizes toll setting by private party.
4.	Does the relevant law permit TIFIA loans to be used on PPP projects?	Yes.	§6(b).
5.	Is the number of PPP projects limited to only a few "pilot" or "demonstration" projects?	No.	§1.
6.	Are there restrictions concerning the geographic location of PPP projects?	No.	
7.	Are there restrictions concerning the particular mode of transportation eligible to be developed as a PPP project (e. g., truck, passenger auto, freight rail, passenger rail)?	No.	§§2(10) and 5 define eligible transportation projects broadly.

8.	Is there a legal requirement to remove tolls after the repayment of project debt?	No.	
9.	Does the relevant law permit the conversion of existing or partially constructed highways into toll roads?	Yes.	No express provision, but broad definition of transportation project eligible under the statute probably encompasses such conversions.
10.	Is there a restriction that prevents the revenues from PPP projects from being diverted to the state's general fund or for other unrelated uses?	Yes.	State financing of WSDOT projects will be through the motor vehicle fund, which restricts the fund's uses to transportation purposes.
11.	Is prior legislative approval required when an individual PPP proposal is received?	Not when proposal is received, but is required in order to finance any state project.	WSDOT projects may only be financed with state treasurer-issued debt. §6(3). All bond proceeds and operating revenues must be placed in a transportation innovative partnership account with the state treasurer. §23. Account funds may only be expended upon legislative approval, either through appropriation or other statutory direction. §23(3).
12.	Are there any similar requirements that subject the PPP proposal or the negotiated PPP agreement to a local veto?	No.	§§ 15 and 16 do, however, require that certain public hearings be held before the Transportation Commission approves the relevant project agreement.
13.	Does the relevant law permit all kinds of procurements for PPP project delivery? These might include, for example, calls for projects, competitive RFQ and RFPs, qualifications review followed by an evaluation of proposer concepts, use of design build, procurements based on financial terms such as return on equity rather than on price, long-term asset leases for some period of up to 60 years or longer from the time operations commence?	Yes, except procurements based on return on equity regarding state projects.	§26 encourages WSDOT to study alternative contracting and innovative project management methods and requires it to prepare a report by 11/1/05 with recommendations for further legislative changes. §18 also requires advisory committees for large projects. However, because no state project may be financed with private funds, evaluation of private equity is irrelevant.
14.	Are there explicit exemptions/supplemental procurement authority from the application of the state's general procurement laws?	Yes.	Exemption confirmed in <i>State ex rel. Citizens Against Tolls V. Murphy</i> , 151 Wn.2d 226, 88 P.3rd 375 (2004).
15.	Does the relevant law authorize the public sector to grant long-term leases/franchises for the construction, operation and maintenance of toll facilities?	Yes.	Projects may be leased to private entity pursuant to §§ 4(4), 5, 6(e) and 14.
16.	Does the public sector have the authority to issue toll revenue bonds or notes?	Yes.	§25 through the state treasurer. Also under separate statute; see §47.46.010 - 47.46.257 (which, per §1, is to be phased out coincident with completion of Tacoma Narrows Bridge project).
17.	Does the public sector have the authority to form nonprofits and let them issue debt on behalf of a public agency?	No.	Precluded by §6(3) (requiring all project indebtedness be issued by state treasurer). §6(4) contemplates 63-20 financing, but this would be restricted to non-transportation facilities co-developed with transportation projects.

18.	Does the relevant public agency have the authority to hire its own technical and legal consultants?	Yes.	§12. However, authority of WSDOT to retain lawyers is restricted by separate laws sole empowering the State Attorney General to represent WSDOT or to retain outside legal counsel to represent WSDOT.
19.	Does the relevant law permit the public sector to make payments to unsuccessful bidders for work product contained in their proposals?	No express provision.	
20.	Can the agency charge application fees to offset its proposal review costs?	Yes.	§10.
21.	Does the relevant law allow adequate time for the preparation, submission and evaluation of competitive proposals? Note that the agency should have the authority to establish these deadlines on a case-by-case basis depending on the complexity and scope of the initial proposal or other factors that might promote competition (e.g., more review time during holiday periods).	Yes.	§17(5).
22.	Is the public sector required to maintain comparable non-toll routes when it establishes new toll roads?	No express provision.	
23.	Are there any non-compete clause prohibitions?	No.	
24.	Is the authority to enter into PPPs restricted to the state DOT or state turnpike authority or may regional or local entities also do so?	Not limited.	§21.
25.	Does the relevant law specify evaluation criteria for PPP proposals received under a given procurement approach?	No.	
26.	Does the relevant law specify the structure and participants for the review process involving PPP proposals?	Yes.	§18.
27.	Does the relevant law protect the confidentiality of PPP proposals and any related negotiations in the period prior to execution of the PPP agreement?	Yes.	§19.
28.	Does the relevant law provide for the ability of the public sector to outsource long-term operations and maintenance and other asset management duties to the private sector?	Yes.	§§4 and 14(a) contemplate operation and maintenance.

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